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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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**JONATHAN DREZNER, MD, and HEIDI GRAY, MD, husband and  
wife,**

**Appellants,**

**vs.**

**CITY OF SEATTLE**

**Respondent,**

**and**

**DAN DUFFUS; SOLEIL LLC; SOLEIL HOMES, LLC; and DL  
DALTON, LLC,**

**Additional Respondents.**

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**SUPPLEMENTAL BRIEF OF ADDITIONAL RESPONDENTS ON  
AWARD OF ATTORNEYS' FEES**

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## I. INTRODUCTION

The City of Seattle (the “City”) issued a land use decision approving a lot boundary adjustment (“LBA”) requested by Dan Duffus.<sup>1</sup> Appellants Drezner/Gray challenged the LBA in the trial court, and the trial court ruled in favor of Duffus. If this Court affirms the trial court’s decision to dismiss Drezner/Gray’s untimely land use petition, then Duffus is entitled to attorneys’ fees under RCW §4.84.370.

Appellants Drezner/Gray make two arguments in their reply brief in opposition to an award of attorneys’ fees to Duffus. Both arguments ignore the plain meaning of the attorneys’ fee statute and attempt to limit the availability of attorneys’ fees by restricting the type of decisions that fall under RCW §4.84.370. First, Drezner/Gray assert that the local-level decision only counts under the attorneys’ fee statute if the decision was made by an administrative appellate tribunal – Drezner/Grey characterize any other decision as “ministerial.” Second, Drezner/Gray assert that if a tribunal made a decision based on jurisdictional or procedural grounds without reaching the merits of the case, then the decision does not count under the attorneys’ fee statute. Neither argument is consistent with the statute, and an on-point Division I case dispels both arguments.<sup>2</sup>

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<sup>1</sup> We refer to the non-city respondents in this case collectively as “Duffus.”

<sup>2</sup> See *Prekeges v. King County*, 98 Wn. App. 275, 990 P.2d 405 (1999).

## II. ARGUMENT

### A. **A Party May Prevail at the Local Level for Purposes of the Attorneys' Fee Statute Even if the Decision Was Not Made by an Appellate Tribunal.**

Drezner/Gray argue that a local-level land use decision only counts under the attorneys' fee statute if the decision was made in an adversarial, appellate setting.<sup>3</sup> This argument fails for the following reasons: (1) the plain meaning of the statute does not require a decision before a local-level appellate tribunal; (2) the only case cited by Drezner/Gray in support of their argument has minimal analysis of this issue; (3) Division I considered this issue and held that review before a local-level appellate tribunal was not required to recover attorneys' fees at the court of appeals; and (4) the Washington Supreme Court interprets RCW §4.84.370 to require two, not three, appeals of a favorable decision.

#### 1. **The Plain Meaning of the Statute Does Not Support Drezner/Gray's Argument.**

The purpose of RCW §4.84.370 is to discourage meritless appeals.<sup>4</sup> To effectuate this purpose, RCW §4.84.370 provides attorneys'

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<sup>3</sup> Appellants also seem to suggest that the City's decision does not count under the attorneys' fee statute because a decision was not "required." This argument ignores Seattle Municipal Code ("SMC") §23.76.028.A(1) and the City's Client Assistance Memorandum 213B (CP at 76). These sources explain the LBA approval process: the City sends a letter containing the Director's decision to approve the LBA, and then the LBA permit issues. The City's decision to approve the LBA is required before issuance of a permit.

<sup>4</sup> *Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011), citing *Gig Harbor Marina*, 94 Wn. App. 789, 800, 973 P.2d 1081 (1999).

fees to a party that receives a favorable land use decision at three different levels:

[R]easonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision.<sup>5</sup>

The party seeking attorneys' fees must have prevailed at the local level, in all judicial proceedings prior to the Court of Appeals, and on appeal at the Court of Appeals or Supreme Court.<sup>6</sup> If a party satisfies these requirements, then an award of attorneys' fees is mandatory.<sup>7</sup>

Drezner/Gray argue that the local-level land use decision only counts where there is an "opponent," meaning an adversarial appellate setting.<sup>8</sup> However, that concept is nowhere found in the statute. The statute does not say the local-level decision must be made by an appellate tribunal or only counts if there is an opponent. Rather, a party prevails at the local level if it receives a favorable land use decision. Without question, Duffus received a favorable local land use decision approving his LBA and the LBA permit.

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<sup>5</sup> RCW §4.84.370.

<sup>6</sup> *Id.*

<sup>7</sup> *Moss v. City of Bellingham*, 109 Wn. App. 6, 30, 31 P.3d 703 (2001).

<sup>8</sup> Appellants' Reply Brief, at 21.

Further, the statute does not exclude “ministerial” land use decisions, as Drezner/Gray assert. In fact, RCW §4.84.370 explicitly covers a building permit “or similar land use approval or decision.” Drezner/Gray themselves note that Type I LBA decisions are similar to building permits.<sup>9</sup> Thus, the plain meaning of the statute requires a rejection of Drezner/Gray’s argument.

**2. The Case Relied Upon by Drezner/Gray Provides Minimal Support for Their Argument.**

The only case that Drezner/Gray cite to support their argument that the City’s favorable LBA decision does not count for purposes of the attorneys’ fee statute is *Asche v. Bloomquist*.<sup>10</sup> *Asche* involved a decision to issue a building permit.<sup>11</sup> In its very brief discussion of the award of attorneys’ fees in *Asche*, Division II said, “[T]he Bloomquists did not receive a county decision in their favor because issuing a building permit is ministerial. The Asches’ first challenge was at the superior court level.”<sup>12</sup> This limited reference to a “ministerial” decision, without any analysis, should not trump the plain meaning of RCW §4.84.370, especially where the court does not explain how its decision can be reconciled with the words of the statute. The court in *Asche* also did not

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<sup>9</sup> Appellants’ Reply Brief, at 7.

<sup>10</sup> 132 Wn. App. 784, 133 P.3d 475 (2006).

<sup>11</sup> *Id.* at 802.

<sup>12</sup> *Id.*

explain how the issuance of a building permit is not a “decision” under RCW §4.84.370 but *is* a land use decision under the Land Use Petition Act (“LUPA”). (“LUPA applies to the issuance of this building permit because the building permit was a land use decision.”).<sup>13</sup> Given the lack of analysis and conflict with the plain meaning of the statute, this Court should decline to follow the two sentences in *Asche* relied on by Drezner/Gray.

**3. Division I Addressed this Issue and Held that Local-Level Appellate Review Is Not Required for a Favorable First-Level Decision under RCW §4.84.370.**

In *Prekeges v. King County*, this Division awarded attorneys’ fees, even though there was no local-level appellate review of a land use decision.<sup>14</sup> King County issued a conditional use permit to U.S. West, and Prekeges missed the deadline to appeal to the hearing examiner, so the County returned Prekeges’ appeal.<sup>15</sup> Prekeges then took his appeal directly to the trial court, and the trial court dismissed because Prekeges failed to exhaust his administrative remedies.<sup>16</sup> Division I affirmed the dismissal and awarded attorneys’ fees.<sup>17</sup> Like *Asche*, there was no “appeal” at the local level in *Prekeges* – the County approved the conditional use permit

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<sup>13</sup> *Id.* at 790.

<sup>14</sup> 98 Wn. App. 275, 277, 990 P.2d 405 (1999).

<sup>15</sup> *Id.* at 279.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 284.

and Prekeges missed his opportunity to appeal the decision.<sup>18</sup> In addition to holding that a party may prevail on jurisdictional grounds, as discussed below, the *Prekeges* court held that “[t]he statute does not require that the local land use decision referenced in subsection (1) [of RCW §4.84.370] be a decision made by an appellate tribunal.”<sup>19</sup>

*Prekeges* disposes of Drezner/Gray’s assertion that a ministerial decision without an opponent does not count under RCW §4.84.370 as a favorable local-level decision. In fact, *Prekeges* explicitly holds that the attorneys’ fee statute does *not* require that the local land use decision be made by an appellant tribunal.<sup>20</sup>

In the Duffus case, the City’s decision does not need to be made by an appellate body, and Duffus prevailed at the City when the City issued a favorable LBA decision. Thus, the City’s decision counts for the purpose of RCW §4.84.370.

#### **4. The Washington Supreme Court’s Interpretation of the Statute Supports Duffus.**

The Washington Supreme Court has held that attorneys’ fees are available under RCW §4.84.370 if a land use decision has been appealed

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<sup>18</sup> *Id.* at 277.

<sup>19</sup> *Id.* at 285.

<sup>20</sup> Drezner/Gray cite to *Prekeges* in a footnote with regard to their second argument that procedural decisions do not count. However, they do not bring this case to the court’s attention with regard to their first argument that a local decision must be by an appellant tribunal in order to count. *Prekeges* disposes of both arguments.

twice. “The possibility of attorneys fees does not arise until a land use decision has been appealed at least twice: before the superior court and before the Court of Appeals and/or the Supreme Court.”<sup>21</sup> The standard set out in *Habitat Watch* does not require an appeal at the local level – it requires a favorable decision in two appeals *after* the decision at the local level. Here, Duffus prevailed when the City issued a favorable LBA decision; Duffus prevailed at the first appeal when the trial court dismissed Drezner/Gray’s petition; and Duffus will prevail at the second appeal if this Court affirms the trial court’s dismissal. This is all that is required under *Habitat Watch*.

**B. A Party Prevails Under the Attorneys’ Fee Statute Even if the Tribunal Does Not Make a Decision on the Merits.**

The Divisions of this Court have taken different approaches to awarding attorneys’ fees under RCW §4.84.370 if the party claiming fees prevailed on jurisdictional grounds, rather than a decision on the merits. Division I, however, has held that attorneys’ fees are available to a prevailing party even if the tribunal did not reach the merits, and the most recent case from Division II also awarded attorneys’ fees where the party prevailed on jurisdictional grounds.

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<sup>21</sup> *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413, 120 P.3d 56 (2005).

**1. Divisions II and III Originally Required a Party to Prevail on the Merits.**

Divisions II and III originally held that a party did not prevail for purposes of the attorneys' fee statute unless the case was decided on the merits.<sup>22</sup> Appellants rely on these two cases alone.<sup>23</sup> Since its decision in *Witt*, however, Division II changed course and has awarded attorneys' fees under RCW §4.84.370 to parties prevailing on jurisdictional grounds.<sup>24</sup>

**2. Division I Has Held that a Party Prevails for Purposes of the Attorneys' Fee Statute if the Case Was Decided on Jurisdictional Grounds.**

This Court should follow the precedent it established in *San Juan Fidalgo, West Coast, Inc.*, and *Prekeges*, and award attorneys' fees even if a tribunal did not reach the merits of the case.<sup>25</sup> In *San Juan Fidalgo*, this Court awarded attorneys' fees under RCW §4.84.370 when a land use petition filed fifteen minutes late was dismissed as untimely.<sup>26</sup> In *West Coast, Inc.*, this Court awarded attorneys' fees after affirming the trial court's decision to dismiss a developer's land use petition because the

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<sup>22</sup> See *Witt v. Port of Olympia*, 126 Wn. App. 752, 109 P.3d 489 (2005); *Richards v. City of Pullman*, 134 Wn. App. 876, 884, 142 P.3d 1121 (2006).

<sup>23</sup> Appellants' Reply Brief, at 21.

<sup>24</sup> *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 383, 223 P.3d 1172 (2009). (“[P]revailing party” under the statute includes circumstances in which courts dismiss a LUPA action on jurisdictional grounds.”).

<sup>25</sup> *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703 (1997); *West Coast, Inc.* 104 Wn. App. 735, 16 P.3d 30 (2000); *Prekeges v. King County*, 98 Wn. App. 275.

<sup>26</sup> 87 Wn. App. at 714-15.

developer failed to exhaust its administrative remedies.<sup>27</sup> Prekeges also failed to exhaust his administrative remedies, and the trial court dismissed his land use petition, and Division I affirmed the dismissal.<sup>28</sup> No court ever ruled on the merits of Prekeges' claims. This Court explained, "Because U.S. West benefited from the hearing examiner's decision [not to consider Prekeges' appeal], and has incurred attorney fees defending that decision in this court against Prekeges' efforts to reinstate his appeal, we hold U.S. West prevailed before King County."<sup>29</sup>

Here, Duffus benefitted from the City's decision to approve the LBA and the subsequent decision to dismiss Drezner/Gray's LUPA petition as untimely. Like U.S. West in *Prekeges*, Duffus has incurred attorneys' fees defending the City's LBA decision against Drezner/Gray's efforts to proceed with an untimely LUPA action. This Court should award attorneys' fees to Duffus if the Court affirms the trial court's dismissal of Drezner/Gray's untimely land use petition.

### III. CONCLUSION

Attorneys' fees are to be awarded under RCW §4.84.370 for a non-appellate City-level decision that has been appealed twice and dismissed on jurisdictional grounds. If this Court affirms the trial court's

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<sup>27</sup> 104 Wn. App. at 743-44.

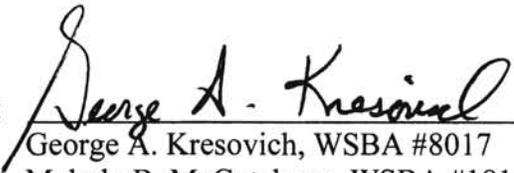
<sup>28</sup> 98 Wn. App. at 277.

<sup>29</sup> *Id.* at 285.

dismissal of Drezner/Gray's untimely petition, then Duffus prevailed at the City, at superior court, and at the court of appeals. Duffus is entitled to attorneys' fees.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of December, 2012.

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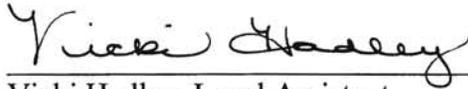
CERTIFICATE OF SERVICE

I hereby certify that I sent a copy of this document to the following parties , in the manner indicated below.

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